IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 671 OF 2005

Gurucharan Singh & Ors. .. Appellants

Vs.

Raja Construction Co. & Ors. .. Respondents

Mr. J. Reis i/by Kiran Jain & Co. for appellants.
Mr. Arif Bookwala i/by M/s. Lilani Shah & Co. for Respondent No.1.

CORAM : B.H. MARLAPALLE, J.

Order Reserved on : July 13, 2005.

Order Pronounced on : July 19, 2005.

P.C.:

1. Heard Mr. Reis i/by M/s. Kiran Jain & Co., the learned counsel for the appellants and Mr. Arif Bookwala i/by M/s. Lilani Shah & Co., the learned counsel for respondent no.1. Respondent No.2 is original defendant no.4 and is presently in jail.

2. Admit. Responden No.1 waives service.

3. This appeal impugns the order dated 2/5/2005

passed by the learned Judge of the City Civil Court at Mumbai allowing the Notice of Motion No. 1951 of 2005 in terms of the following directions:-

> "(a) The defendants shall not dispose of, deal with, alienate, encumber, part with possession or create third party rights or in any manner deal with the suit property viz. the 2nd floor and the open terrace thereon and one room on the Southern Side of the ground floor in Santsadan, 10, Union Park, Pali Hill, Bombay-50.
>
> (b) The Court Receiver appointed in the High Court Suit No.1711/94 shall continue as Court Receiver in this suit also."

4. The Notice of Motion was taken out in S.C. Suit No.1186 of 2005 and the said suit has been filed for a declaration that the Decree and Order passed in B.C.C.C. Suit No.5690 of 1981 is not binding upon the

plaintiff and for a further relief of permanent injunction restraining the Defendant Nos.1 to 4 from dealing with, disposing off, alienating, encumbering, parting with possession, creating third party rights or in any manner dealing with the said property i.e. "Santsadan", 10, Union Park, Pali Hill, Bombay-50 or any part or portion thereof. For execution of the said Decree in Suit No.5690 of 1981, the decree holders i.e. present appellants had filed Execution Application No.457 of 2005. Notice was issued to the present respondent no.2 under Order XXI Rule 22 of C.P.C. and it was made absolute on 14/10/2004 against the defendant in S.C. Suit No.5690 of 1981. Warrant was issued by the Executing Court on 16/11/2004. Accordingly, the lock put by the Judgment Debtor to the room on the Southern Side of the ground floor of the suit building was opened and the possession of the said room was handed over to the plaintiffs i.e. the present appellants. Thus, the decree passed in S.C. Suit No.5690 of 1981 and executed in Execution Application No.457 of 2004 pertains to the room on the Southern Side located on the first floor of the suit building.

5. While opposing the Notice of Motion filed in S.C.Suit No.1186 of 2005, the appellants- defendants nos.1 to 3 had contended that the plaintiff - present respondent no.1 was required to file an application under Order XXI Rul 99 of C.P.C. and the suit filed could not be entertained. The learned Judge of the trial court after referring to the decisions in the case of V.K. Rama Setty Vs. A. Gopinath reported in **AIR 1998 Karnataka 186**, Pavan Kumar and anr. vs. Gopalakrishna and anr. reported in **AIR 1998 Andhra Pradesh 247**, Shreenath and anr. vs. Rajesh and ors. reported in **(1998) 4 Supreme Court Cases 543**, Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and anr. reported in **(1997) 3 Supreme Court Cases 694**, Nusserwanji Poonegar and ors. vs. Mrs. Shirinbai Bhesania and ors. reported in **AIR 1984 Bombay 357** and N.S.S. Narayana Sharma and ors. vs. M/s. Goldstone Exports (P) Ltd. and ors. reported in **AIR 2002 S.C. 251** held that the fresh suit was maintainable. The trial court also noted that the decree obtained as far back as on 11/9/1992 was suppressed by the defendant nos.1 to 3 in their application made in the

plaintiffs' Suit No.1711 of 1994 filed before this Court.

6. At the out set, it requires to be noted that the trial court fell in manifest errors in reading the said decision of the Apex Court in the Case of N.S.S. Narayana Sharma (Supra). In Shreenath's case the Apex Court concluded its findings in the following words:-

> "...Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under Order 21 Rule 97. One has not to wait for his dispossession to enable him to participate in the execution proceedings. This shows that such a person can sought to be dispossessed by the decree-holder. For all the aforesaid reasons, we do not find the Full Bench in Usha Jain (AIR 1980 MP 146) correctly decided the law."

6A. In the case of N.S.S. Narayana Sharma (Supra), the Supreme Court stated that when any person claiming title to the property in his possession obstructing the attempt by the decree-holder to dispossess him from the said property, the Executing Court is competent to consider all questions raised by the person offering obstruction against execution of the decree and pass appropriate order, which under the provisions of Order XXI Rule 103 of the C.P.C. is to be treated as a decree. The position in law is thus clear and the objection raised by the defendant nos.1 to 3 on the maintainability of the fresh suit i.e. S.C. Suit No.1186 of 2005 was required to be, prima facie, answered in favour of the defendants. If the suit itself was not maintainable, the Notice of Motion could not have been entertained.

7. The property described as piece and parcel of land/plot bearing CTS No.D/III admeasuring 653 sq.yds. equivalent to 546 sq.mtrs. together with structure standing thereon bearing Municipal House No.33-J situate at Pali Hill, Bandra (West), Bombay belonged to three brothers, viz. Nathasingh, Hardeepsingh and

Avtarsingh Chawla. The present appellants are sons of Nathasingh Chawla. As per the plaintiff, the other two brothers, viz. Hardeepsingh and Avtarsingh Chawla had sold their undivided 2/3rd share from the said property to defendant no.4 by an Indenture of Conveyance dated 7/10/1981. The plaintiff, in turn, by an agreement for sale dated 11/5/1992 agreed to acquire and purchase from defendant no.4 the said 2/3rd undivided share, right, title and/or interest on the terms and conditions more particularly stipulated in the said agreement for a consideration of Rs.9,50,000/-. It is further contended that the defendant no.4 executed an irrevocable power of attorney in favour of the plaintiff to deal with the said property including development, construct thereupon, submit plans for sanction, settle with the other co-owner etc. The balance of 1/3rd share from the joint property belongs to the present appellants who are the LRs of Nathasingh Chawla and it was alleged that they are in possession of the entire first floor, part of the ground floor of the building standing on the suit plot. The plaintiff claimed to be in possession in respect of the full second floor

and one room on the ground floor in the capacity of owner and/or on behalf of the defendant no.4 and/or in part performance of the agreement for sale dated 11/5/1992.

8. Thus, the entire case of the plaintiff is based on the agreement for sale dated 11/5/1992. The appellants had instituted S.C. Suit No.5690 of 1981 against the defendant no.4 for a permanent injunction from entering into the ground floor, first floor and the open space on the terrace except the stair-case leading to the flat on the terrace of the building known as "Santsadan", 10, Union Park, Pali Hill, Bandra and from disturbing the use and occupation of the plaintiff therein, of the ground floor, first floor and open space on the terrace of the suit building. The said suit has been decreed on 11/9/1992 by the Bombay City Civil Court.

9. It is not in dispute that defendant no.4 had filed RAD Suit No.6835 of 1980 in the Small Causes Court at Bombay and obtained ex-parte injunction on 7/10/1981 and, therefore, Nathasingh had to file S.C.

Suit No.5690 of 1981. Ad-interim injunction order passed on 7/10/1981 was made absolute on 5/9/1983. At this stage, on the basis of the purported Indenture of Conveyance dated 7/10/1981 executed by Hardeepsingh and Avtarsingh in favour of defendant no.4, defendant no.4 got the land records of the suit property changed showing the 2/3rd undivided share in his favour and remaining 1/3rd undivided share of Nathasingh Chawla without issuing any notice to Nathasingh Chawla or obtaining his NOC. Suit No.7/8 of 1983 was filed by Nathasingh Chawla for recovery of possession and compensation of license premises i.e. the open terrace and one room on top of second floor. The said suit was decreed ex-parte in favour of Nathasingh Chawla for recovery of possession of the said room given on leave and license to defendant no.4, on 9/10/1984. Contempt notice was taken out against defendant no.4 by the present appellants in Suit No.5690 of 1981 for breaking the compound wall and enclosing the open terrace with brick masonry walls in violation of the various court orders and by an order dated 13/3/1986 the defendant no.4 was ordered to be put in civil prison for seven days and was further

ordered to repair the compound wall and demolish the unauthorised room.

10. In retaliation the defendant no.4 filed Civil Suit No.2661 of 1987 in the High Court for declaring him to be the owner of 2/3rd undivided share in the suit property. He also challenged the order passed in Contempt Proceedings by way of an appeal and the said appeal came to be dismissed by this court on 7/1/1988. Notice of Motion No.3190 of 1987 was filed in High Court Suit No.2661 of 1987 and it came to be dismissed with costs on 4/4/1989. On the basis of the agreement for sale dated 11/5/1992, the defendant no.4 and the present respondent no.1 filed S.C. Suit No.4818 of 1992 in the City Civil Court at Mumbai. Notice of Motion for injunction was taken out in the said suit and by an order dated 31/7/1992 ad-interim relief prayed for was refused. Suit No.4818 of 1992 came to be dismissed on 24/11/1997.

11. High Court Suit No.1711 of 1994 came to be filed by the plaintiff for specific performance of the agreement dated 11/5/1992 purportedly signed by

defendant no.4. Defendant no.4 has contested the said suit and alleged that the agreement dated 11/5/1992 is a forged document and/or it is purported to have signed by the so called power of attorney on the basis of a forged/fabricated instrument. The said suit is still pending. In the said suit the appellants had taken out Chamber Summons for impleading as a party defendant, but it came to be rejected. The appellants, therefore, filed Appeal No.138 of 1997 in Suit No.1711 of 1994 and the appeal is pending. By the interlocutory order passed in the said appeal a Division Bench of this court held that any order or orders passed in High Court Civil Suit No.1711 of 1994 would not be binding on them.

12. From the above set of sequence of events arising from the Civil Suit and Appeal pending before this court, it is clear that the plaintiff’s title to the 2/3rd share in the joint property is subject to the decision in the appeal as well as the suit pending in this court. As noted earlier, the defendant in High Court Suit No.1711 of 1994 has already taken a stand that the agreement for sale dated 11/5/1992 is a

forged document and/or it is based on a forged power of attorney and the said defendant who is impleaded as defendant no.4 in S.C. Suit No.1186 of 2005 is presently undergoing imprisonment. Prima facie the title of the plaintiff-firm to the 2/3rd joint share has not yet crystalised and the same is contested by its vendor i.e. defendant no.4. Though the Commissioner's report submitted in Suit No.1711 of 1994 shows that a representative of the plaintiff was in occupation of one of the rooms on the ground floor when the Commissioner visited the suit premises, it needs to be noted that the injunction order passed in S.C. Suit No.5690 of 1981 was operating in respect of the ground as well as first floor and the open space on the terrace and the defendant no.4 who is claimed to be the vendor of the plaintiff-firm was punished for contempt for violating the said injunction. The appellants' appeal is pending before this court and if the same is allowed they would be joined as parties in Suit No.1711 of 1994 and thereafter the plaintiff's claim to the suit property can be adjudicated. Under such circumstances, there is no prima facie case in favour of the plaintiff-firm to claim an order of

temporary injunction against the appellants on account of filing S.C. Suit No.1186 of 2005 challenging the Decree and Order passed in BCCC Suit No.5690 of 1981.

13. The impugned order thus fails on both the grounds, viz. prima facie maintainability of S.C. Suit No.1186 of 2005 and balance of convenience in favour of the plaintiff in as much as the execution of the agreement for sale dated 11/5/1992 has been challenged by defendant no.4. The impugned order making the Notice of Motion absolute in terms of prayer clauses (a) and (b) is, therefore, indefensible and the appeal must succeed.

14. The appeal is, therefore, allowed and the impugned order dated 2/5/2005 is hereby quashed and set aside. Consequently the Notice of Motion No. 1951 of 2005 fails and the same is hereby dismissed.

(B.H. Marlapalle,J.)